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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-324

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SIDNEY S. HICKLIN, *et al.*,

*Appellants,*

v.

EDMUND ORBECK, *et al.*,

*Appellees.*

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ON APPEAL FROM THE SUPREME COURT
OF ALASKA

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

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29 December 1977

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# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

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Pursuant to Rule 42 of the Rules of this Court, the National Right To Work Legal Defense Foundation hereby moves for leave to file the annexed brief *amicus curiae*, urging that this Court reverse the decision of the Supreme Court of Alaska.

## INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is a charitable corporation the purpose of which is to provide legal assistance to employees who have suffered deprivations of constitutional, statutory, or common-law rights arising out of compulsory unionism. Much of the litigation which the Foundation supports is concerned with the "right to work", the freedom of every wage-earner to pursue his trade or profession unencumbered by governmentally imposed conditions or requirements unrelated to *bona fide* occupational qualifications for employment. The Foundation sees in this case, and particularly in the holding of the Supreme Court of Alaska that the "right to work" is not "fundamental", a matter for grave concern. First and foremost, the decision of the Alaska Court undermines and threatens the rights, privileges, and immunities of many wage-earners now pursuing judicial and other legal relief against the abuses of compulsory unionism with the aid of the Foundation. In addition, that decision has a wide-ranging significance to all Americans. In an era characterized by economic stagnation, inflation, and unemployment, the predictable response of local and state law-makers to the economic difficulties with which they are beset is to turn to protectionism and restrictionism in an attempt, howsoever futile it may be, to insulate their communities from national problems. Thus, if the attitude of the Alaska Court towards the "right to work" gains currency and legitimacy, not only further abuses of compulsory unionism, but also other forms of restrictionism and protectionism will find increasing favor



among local leaders, encouraging (if not resulting in) an economic "feudalization" of industry, with incalculable burdens upon wage-earners as one necessary concomitant.

The Foundation believes that the Appellants are seriously and skillfully defending their interests. None the less, it fears that their natural preoccupation with the issues of most immediate relevance to them may so narrow the focus of their attention as to cause them to overlook or insufficiently to emphasize to this Court issues of more wide-ranging implication and consequence. One of these issues, which the Foundation intends to discuss in its annexed brief *amicus curiae*, is the interrelation of the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. The Foundation believes that this interrelation is of great significance, not only in the instant case, but also in constitutional jurisprudence generally. It submits, therefore, that its participation as *amicus curiae* will materially assist this Court in deciding the questions before the bench – both with justice for the litigants, and with a proper concern for the effects of the Court's decision in the long term.

Respectfully submitted,

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29 December 1977

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## BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

---

The National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of Appellants Sidney S. Hicklin, *et al.*, urging this Court to reverse the decision of the Alaska Supreme Court.

## INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The interest of the National Right to Work Legal Defense Foundation in participating as *amicus curiae* in this case appears in the Motion for Leave to File Brief Amicus Curiae submitted herewith.

## SUMMARY OF THE ARGUMENT

This case involves the interrelation of the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. The Thirteenth Amendment guarantees equal protection in the exercise and enjoyment of the freedom to contract for employment, and recognizes this freedom as "fundamental" in character. Because of its source in the Thirteenth Amendment, the freedom to contract for employment is a privilege of national citizenship. It is also an essential element of commerce in labor services among the states. Alaska Hire denies citizens of states other than Alaska an equal legal opportunity to contract for employment in an industry of that state which participates in interstate commerce. This denial violates the Equal Protection Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV, §2.



## ARGUMENT

Although the Supreme Court of Alaska considered the "right to work" of little importance to its decision to uphold the constitutionality of Alaska Hire, that concept, rightly understood, is central to this case — because it explains the unique integration of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, §2, and the Commerce Clause of Article I, §8. In this regard, we shall demonstrate four things: *First*, the Thirteenth Amendment guarantees to all persons in the United States an equal freedom to offer and accept contracts for employment. *Second*, this equal freedom of contract in employment is one of the privileges and immunities which Article IV, §2 secures against discriminatory state action. *Third*, denial to the states of any power to interfere with freedom of contract in employment is necessary to protect interstate commerce from the stifling effects of local protectionist legislation. *Fourth and last*, by discriminatorily denying qualified citizens of other states the freedom to offer and accept contracts for employment in an industry inextricably connected with interstate commerce, Alaska Hire denies them equal protection of the laws, and deprives them of a privilege of national citizenship.

## I.

**The most fundamental of all constitutional guarantees is the freedom of each citizen, on the basis of legal equality with all other citizens, to offer and accept contracts of employment in the trade or profession for which he is qualified.**

To deal adequately with the issues which this appeal presents, we must advert at some length to constitutional principles and provisions so fundamental that their teachings and directing influence on the course of adjudication are generally taken for granted – until, as in this case, a lower court disregards them. The constitutional principle with which we shall concern ourselves is the "right to work", as we understand it: namely, freedom of contract in employment. And the constitutional provision upon which we shall focus is the article which guarantees a nationwide "right to work": namely, the Thirteenth Amendment.

### A. Freedom of contract is perhaps the most pervasive of all the constitutional principles which secure autonomy and independence to the individual.

It is fashionable in some quarters to deride the principle of "freedom of contract" as an "abstract absolute", an empty and meaningless concept. Nothing could more egregiously distort and defame its position and role in our constitutional jurisprudence.

As a matter of legal categorization in the general case, "freedom" implies as its logical corollary a



disability in government to control or limit individuals in its exercise. On the other hand, as a matter of practical definition in any particular case, freedom involves the actual behavior of individuals characterized by the unique facts of time, place, and manner. All freedoms, then, are abstract in definition, but specific in application. Moreover, in either case, all real freedoms are and must be absolute, in the sense that, within the ambit of a particular freedom, government power is nonexistent. For if the concept "freedom" delimits the concept "governmental power"; and if freedom is not absolute, or capable of fixing and confining the actions of government according to objective standards; then the power of government is unlimited, or totalitarian – a conclusion which contradicts the first principle of our political system.

Operationally, freedom means that there always remains some area in which the individual himself, and not the political process, chooses how he will conduct his own affairs. Not because the political process has not preempted individual choice (for example, by inadvertence), but rather because the political process may not legitimately preempt that choice, even if a majority so wills. To be sure, the content of particular freedoms differs according to the protean nature of time, place, and circumstances. For instance, "freedom of speech" may mean one thing in a person's home, another thing in a public street, and something else again in the proverbial "crowded theatre". But, in any event, the meaning of constitutional – or limited – government is that no set of circumstances can exist under which the political process may rightfully claim that all individual freedoms have no content simultaneously.

In short, to contend in general that freedom as a legal category is not an abstract absolute is to deny the possibility of constitutionalism. And to claim in a particular case that a recognized freedom is not absolute in its own right is to deny the applicability and controlling nature of the Constitution. Either assertion is meritless.

As a generality, "freedom of contract" means that individuals among themselves may make arrangements which courts will enforce according to common-law principles, without the intervention of the political branches of government. (The enforceability of these arrangements through judicial process distinguishes freedom of contract from freedom of association, although evidently there are cases where the two are identical.) Freedom of contract thus permits individuals to order and regulate their own lives without majoritarian interference – in other words, to govern themselves. Freedom of contract and self-government are two sides of the same coin.

As applied, freedom of contract is always freedom of contract in respect of some specified activity, such as freedom of contract to speak on public issues by purchasing space in a newspaper; or freedom of contract to associate with others in a lawful private organization; or, as in this case, freedom of contract to seek employment in a state other than the state of one's citizenship. In any particular case, then, reference to constitutional principles other than freedom of contract is usually necessary to define the substantive conduct in which individuals may engage with self-determination and independence of the political process. For example, the First Amendment protects



freedom of speech explicitly, guarantees freedom of association implicitly, and says nothing at all about freedom of contract. But the common-law contractual process of offer and acceptance which furthers the exercise of individual First-Amendment liberties partakes derivatively of the same constitutional protection those liberties enjoy: both freedom of contract to speak and freedom of contract to associate are, and must logically be, "preferred" freedoms. In these cases, the First Amendment supplies the content and defines the ambit of freedom of contract. Numerous other examples exist, drawing their inspiration from various constitutional provisions – including the freedom to contract for the purposes of self-defense, guaranteed by the Second Amendment; the freedom to contract for the purposes of securing privacy, guaranteed by the Ninth Amendment; and so on. Here, though, we are concerned with a particular freedom of contract that is not derivative of, but rather inherent in, a constitutional right: namely, the freedom to contract for employment, the freedom which is the primary subject of the Thirteenth Amendment. The absence of "slavery", as the Thirteenth Amendment. understands that term, is the presence of the freedom to offer and accept contracts of employment on the basis of legal equality among all qualified individuals.

Before turning to constitutional exegesis, however, we should emphasize that, *pace* the Alaska Court, the character of the freedom to contract for employment (the "right to work") is *not* such as "unduly [to] constrict the legislature's ability to respond to perceived public needs, without any corresponding benefit to personal liberty or the public good". Jurisdictional Statement at 13a (footnote omitted). Freedom of

contract in employment does not preclude government, as an employer, from establishing rational, work-related qualifications with respect to its own employees' hire, tenure, or other terms and conditions of employment. Neither does it preclude government, where the latter possesses constitutional authority to supervise or regulate private employers, from imposing rational, work-related limits on how they deal with their employees. Nor does it preclude government, in appropriate circumstances, from requiring those practicing a profession to meet and maintain minimum levels of competence or character in serving the public. Freedom of contract in employment poses no obstacle to governmental action in these cases because that freedom itself implies a constitutional privilege to contract only for that employment for which an individual qualifies in terms of rational, work-related criteria and standards. The creation and enforcement of these criteria and standards by government, as an employer or as the regulator of other employers or self-employed persons, thus cannot interfere with freedom of contract in employment, by hypothesis. And, in such circumstances, no more is necessary than that any limits on employment freedom be rationally work-related in fact. *E.g., Board of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976).

Conversely, absent a real and substantial connexion in fact between a governmental regulation of contracts for employment and the peculiar technical requirements of that employment, any such regulation is unconstitutional *per se* – because it necessarily constitutes a "badge and incident of slavery", outlawed without exception by the Thirteenth Amendment.



**B. The Thirteenth Amendment specifically guarantees an equal freedom of contract in employment to everyone in the United States.**

This appeal does not raise a Thirteenth-Amendment issue directly. However, the holding of the Supreme Court of Alaska that Alaska Hire is consistent with the Equal Protection Clause of the Fourteenth Amendment indirectly implicates the antislavery provision. The Alaska Court ruled that the freedom to contract for employment (the "right to work") is not a "fundamental" right, and that the discrimination between Alaska citizens and citizens of other states worked by Alaska Hire is therefore permissible, since it purportedly serves a rational state interest in promoting the local economy. That this conclusion is erroneous on mere Fourteenth-Amendment grounds seems clear. *Truax v. Raich*, 239 U.S. 33, 41-42 (1915). But, even more convincingly, study of constitutional history proves beyond debate that the freedom to contract for employment is as fundamental a personal liberty as the Constitution recognizes, and that the Thirteenth Amendment secures an absolute legal equality in the exercise and enjoyment of that freedom for all persons in the United States.

This Court has but infrequently applied the Thirteenth Amendment. However, on those few occasions the Court has given its language a construction as liberal as its purpose is important. The Amendment, representative opinions make clear, extends its protection to every individual, its "plain intention" being "to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free". *Bailey v. Alabama*, 219

U.S. 219, 241 (1911); *Hodges v. United States*, 203 U.S. 1, 16-17 (1906); *Civil Rights Cases*, 109 U.S. 3, 20, 33 (1883) (opinion of the Court; Harlan J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

The legislative history of the Thirteenth Amendment and of the civil-rights statutes which Congress enacted pursuant to it immediately after the Civil War confirms this broad interpretation. From 1864 to 1866, Congress confronted the practical problem of eradicating negro chattel slavery in the United States. During the opening days of the Thirty-ninth Congress, members introduced a number of bills and resolutions on the slavery issue. *Cong. Globe*, 39th Cong., 1st Sess. 39, 46, 69, 91-92 (1865). Congress enacted none of the proposals – not because of their ultimate goals, on which there was general agreement, but because the congressional majority adjudged them too narrow in scope to achieve the wider purpose of Congress, and because majority leaders had decided to postpone action until after adoption of the Thirteenth Amendment so that "legislation on this subject [might] be general throughout the United States". The proposed bills and resolutions had evinced a common concern for equal protection of the law and for the preservation of each individual's fundamental rights; but they did "not go far enough". *Id.* at 41, 43 (Senators Sherman and Trumbull).

During the debates on the Thirteenth Amendment, its spokesmen had been emphatic that "[e]very vestige of slavery in the entire country must be removed". To congressional leaders such as Representative Ignatius Donnelly, there could be "no safety for this nation so



long as a spark of vitality remains in the institution of slavery" – which counseled "the destruction of slavery, its utter and absolute destruction". For them, said Senator Henry Wilson, the Thirteenth Amendment was necessary to and would "obliterate the last lingering vestiges of the slave system", "all it was and is, everything connected with it or pertaining to it". Therefore, it was hardly unnatural for Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and a decisive moving force behind the Thirteenth Amendment, to argue that "when the constitutional amendment is adopted * * * we may pass a bill * * * that will be * * * sweeping and efficient". For he was perhaps foremost among those who believed that "[w]ith the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support. Let them all be abolished" – "not only * * * in name, but in fact". *Id.*, 38th Cong., 1st Sess. 1246 (Representative Beaman), 2037, 2038, 1324 (1864); *id.*, 39th Cong., 1st Sess. 43, 323 (1865-1866).

Senator John Sherman also pointed out that effective legislation should be couched in "definite", "distinct", and "clear" language, "naming and detailing precisely the rights that * * * shall be secured", in order that "there shall be hereafter no dispute or controversy". *Id.* at 42.

**1. The Thirteenth Amendment guarantees the freedom to contract for employment in order to eradicate the primary badge and incident of slavery.**

When they undertook to name and detail precisely a set of fundamental personal liberties, the framers of the Thirteenth Amendment were well aware that slavery is not necessarily confined in practice to any precise condition. As Representative Donnelly noted,

> [e]very country tolerating slavery has affixed to it conditions peculiar to itself. * * * A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor as fully as if deprived of all; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled; he may be oppressed by a convocation of masters called a Legislature as fully as by a single master.

*Id.* at 588. Because slavery may exist, then, not only in outright bondage but also in more subtle deprivations of fundamental freedom, the framers of the Amendment were careful, in its second section, to authorize Congress to determine what are its "badges and incidents" and to provide effective legislation to eradicate them completely. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968); *see Blyew v. United States*, 80 U.S. (13 Wall.) 581, 601 (1872) (Bradley, J., dissenting).



Two early and important pieces of such legislation were the Civil Rights and Freedmen's Bureau Bills.[1] In most instances, comments on the purpose and effect of the Civil Rights Bill, especially, reflected the views of the post-Civil-War Congress on the scope of the Thirteenth Amendment. For Congress intended the Civil Rights Bill "to give effect to" and to create "a power enforcing the language of the Constitution, guarantying all the rights which th[e Thirteenth A]mendment gives". Senator Trumbull, for one, described the relationship as one of means and ends. To him, the Civil Rights Bill secured "to all persons within the United States practical freedom". The particular freedoms guaranteed by the bill were "appropriate" means to safeguard the general individual liberty decreed by the abolition of slavery. *Cong. Globe*, 39th Cong., 1st Sess. 602 (Senator Lane), 1805 (Senator Doolittle), 474 (1866).

Those who opposed passage of the Freedmen's Bureau and Civil Rights Bills argued that the Thirteenth Amendment merely dissolved the legal bond which held the negro slave to his master as a form of property. *E.g., id.* at 113, 318, 476, 499, 576, 600-01, 623, 628, 1268, 1784. Such claims were highly inconsistent –

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[1] Congress enacted the Civil Rights Bill over the veto of President Andrew Johnson as the Civil Rights Act of 1866, Act of 9 April 1866, ch. 31, §1, 14 Stat. 27, *re-enacted by* §18 of the Enforcement Act of 1870, Act of 31 May 1870, ch. 114, §18, 16 Stat. 140, 144, *and codified in* §§1977-78 of the Revised Statutes of 1874, *now* 42 U.S.C. §§1981-82 (1970). Its purpose was to extend the basic protections of the Freedmen's Bureau legislation to the entire country. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 424 n.31 (1968).

coming as they did from men who had earlier opposed enactment of the Amendment on the very ground that it would give Congress virtually unlimited authority to enact laws for the protection of civil liberties in every state. *Id.*, 38th Cong., 1st Sess. 1364-67, 2615-18, 2940-43, 2945-47, 2960-62, 2982-88 (1864); *id.*, 38th Cong., 2d Sess. 178-83, 193-95, 238-41, 480-81, 528-30 (1864-1865). And they were specifically refuted by the congressional majority.

In the debates of 1864, for example, Senator Daniel Clark carefully defined the "essential difference between the emancipation of slaves and the abolition of slavery". He explained that the former "concerned the persons of slaves" and "rescued some of [the] victims [of slavery]", while the latter "is of wider scope and more searching operation" – designed not only to free the men then in bondage, but also to "mak[e] slavery impossible" in the future. In the debates of 1866, the congressional majority was equally explicit concerning the far-reaching authority granted by the Thirteenth Amendment. "[I]ts effect", said Senator James Guthrie, "is to work the complete freedom of every individual, and to break down every provision in the Constitution and laws of the United States and of the several States which prevents the enjoyment of that freedom". Moreover, the Amendment strikes down not only laws directly supporting slavery, but also, as Senator Wilson made clear, all "laws tending to the same end". *Id.*, 38th Cong., 1st Sess. 1369 (1864); *id.*, 39th Cong., 1st Sess. 335, 340 (1866).

Representative Donnelly, therefore, was not engaging in congressional hyperbole when he enjoined his



colleagues that, "having prohibited slavery, we must not pause for an instant until the spirit of slavery is extinct, and every trace left by it in our laws is obliterated". For, as Senator Trumbull argued, the object of the Thirteenth Amendment is not simply the destruction of slavery but "the destruction of the incidents to slavery" as well, all those "badges of servitude made in the interest of slavery and as a part of slavery". Similarly, Representative Thayer described the purpose of the Amendment as the eradication of "all the oppressive incidents of slavery", "all the concomitants, all the disabilities, and all the tyrannical restrictions which grow out of and were a part of th[e] condition of slavery". Its "practical effect", he observed, "is to declare not only that slavery shall be abolished upon the pages of [the] Constitution, but that it shall be abolished in fact and in deed", "abolished and destroyed forever". *Id.* at 585, 322, 1152.

In short, "[t]he Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery * * *, but it prevents the impositions of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting); *see Cong. Globe*, 39th Cong., 1st Sess. 77 (1865) (Senator Trumbull).

Both Congress and the courts have explicitly and repeatedly recognized as foremost among the badges and incidents of slavery two related deprivations of fundamental freedom: (i) the disability to make employment contracts; and (ii) the absence of right to

hold as personal property for the employee's own use and benefit the wages derived from the employment relation. As this Court emphasized in the *Civil Rights Cases*, the absence of right to hold property derived from labor, the disability to make employment contracts, "and such like burdens and incapacities" were the preëminently "necessary" and "inseparable incidents of the institution" of slavery which the post-Civil-War Congress intended to extirpate by means of the Thirteenth Amendment and its legislative progeny. 109 U.S. 3, 22 (1883); *accord, Hodges v. United States*, 203 U.S. 1, 31, 35 (1906) (Harlan, J., dissenting), *overruled and dissent adopted in Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-37 (1968). And indeed, unless the Thirteenth Amendment did guarantee to all citizens an equal freedom to enter into and to benefit fully from employment contracts, its promise to abolish every vestige of slavery and to work its utter and absolute destruction would be essentially unavailing. For the disability to contract for employment was the "inflexible rule of * * * slavery, wherever it existed". *Hall v. United States*, 92 U.S. 27, 30 (1876); *see, e.g., Anderson v. Poindexter*, 6 Ohio St. 622 (1857); *State v. Van Lear*, 5 Md. 91 (1853); *Gist v. Toohey*, 2 Rich. 424 (S.C. 1846); T. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America*, 246 (1858). In abolishing the "peculiar institution", then, the Thirteenth Amendment necessarily made absolute the equal freedom of all individuals to contract for employment.

So the legislative history demonstrates. Even before the states had ratified the Amendment, Senator Trumbull began to identify those fundamental personal



liberties which its guarantee addresses. Men are not free, he asserted, without the privileges "to go and come when they please, to buy and sell when they please, [and] to make contracts and enforce contracts * * *. These are [the] rights which the first clause of the constitutional amendment meant to secure to all". *Cong. Globe*, 39th Cong., 1st Sess. 43 (1865). Later, Trumbull introduced the Freedmen's Bureau and Civil Rights Bills, both of which proceeded on the theory that effective implementation of the Thirteenth Amendment required Congress to identify specific "civil rights and immunities", and to provide protection for these freedoms. Accordingly, section 1 of the Civil Rights Bill and section 7 of the Freedmen's Bureau Bill contained an identical list of rights, including "the right to make and enforce contracts" and to "purchase, lease, sell, hold and convey * * * personal property". *Id.* at 1151 (Representative Thayer), 476 (Senator Trumbull).

The whole congressional majority agreed that "the civil rights belonging to * * * every American citizen", those "fundamental rights and immunities which are common to the humblest citizen of every free State", include the freedom to make and enforce employment contracts and to hold personal property derived from labor. Senator Trumbull, for example, defined "civil rights, fundamental rights belonging to every man as a free man" in those very terms. He consistently argued that, since the essence of individual freedom is the unrestricted power and privilege to make employment contracts, the Thirteenth Amendment imposes a duty on the federal government to strike down all state and local laws interfering with contractual self-determination. "It is idle to say that a man is free * * * who

cannot * * * make contracts and enforce contracts", he emphasized. To like effect, Representative Thayer questioned the practical value of the Thirteenth Amendment if government were permitted to enact "laws which impair [individuals'] ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts". "What kind of freedom is that", Thayer asked, "under which a man * * * may be deprived of the ability to make a contract" and "of the liberty to engage in the ordinary pursuits of civilized life * * *?" And Representative Burton C. Cook expressed disbelief that "the rights of free men" could be protected "except by securing to them the right to make and enforce contracts". "It is idle", remarked Representative William Lawrence, "to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live", or "the right to make a contract to secure the privilege and the rewards of labor". *Id.* at 476, 322, 43, 1151, 1152, 1124, 1833.

In sum, the legislative history demonstrates that the Thirteenth Amendment recognizes the freedom to contract for employment as a fundamental personal liberty.

### 2. The Thirteenth Amendment secures equal protection in the exercise and enjoyment of the freedom to contract for employment.

The Thirteenth Amendment is also vitally concerned with legal equality in the exercise and enjoyment of this freedom. The concept of equal protection of the



law was a major topic of congressional debate immediately prior to the ratification of the Amendment. "[E]quality of rights", "equal before the law", "personal freedom without distinction", and like phrases recur again and again throughout the legislative history. The principle that "all men [are] free and equal", said Representative Josiah Grinnell, is "the cornerstone of [the United States], and * * * above all constitutions and all laws". Concurring in this judgment, Representative Godlove S. Orth argued that "[t]he effect of [the Thirteenth A]mendment will be * * * a practical application of the self-evident truth, 'that all men are created equal' ". Representative Thomas T. Davis also asserted that "[n]ature made all men free, and entitled them to equal rights before the law" – and that Congress designed the Thirteenth Amendment to "asser[t] this principle of legal or civil equality". *Id.*, 38th Cong., 1st Sess. 2614 (1864) (Representative Morris); *id.*, 38th Cong., 2d Sess. 155 (Representative Davis), 143 (Representative Orth), 199, 142, 154 (1865).

The congressional majority also made clear that it did not intend to confine this principle of legal equality to the protection of the black race alone. As Representative Nathanial B. Smithers noted, throughout history slavery unquestionably "had its origin in force. It claims no natural sanction for its existence, nor in its operation is it confined to any race. The white man equally with the black has been the subject of its oppressive jurisdiction". And Representative John A. Kasson emphasized that the Thirteenth Amendment would completely eradicate the institution that "[t]ake[s] away * * * fundamental rights from any large class of human beings". *Id.* at 216, 193.

Opponents of the Thirteenth Amendment also asserted – albeit with trepidation – that it would guarantee a basic minimum of personal freedom and legal equality. Repeatedly, the congressional minority denounced the Amendment because it would make all men equal before the law. Its effect, they feared, would be unequivocally to deny what they considered "the right of the States * * * to fix each for itself the status * * * of all * * * people who dwell within their borders". *Id.*, 38th Cong., 1st Sess. 2616 (1864) (Representative Herrick).

Later, in the Senate debates on the Freedmen's Bureau and Civil Rights Bills, Senator Trumbull explained that, although it is difficult "to define accurately what slavery is and what liberty is", "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited". Under the Thirteenth Amendment, Trumbull asserted, the federal government "may destroy all these discriminations in civil rights", since otherwise the Amendment would "amoun[t] to nothing". On the basis of this authority, he described the Civil Rights Bill as "declar[ing] that in civil rights there shall be an equality among all classes of citizens". And he made clear that Congress intended no narrow equality drawn exclusively along racial lines. The Bill, said Trumbull, "applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights". Neither was the congressional commitment to equality to be undertaken with half-measures. "[A]t all hazards and



under all circumstances", Trumbull declared, "there shall be impartiality among all classes in civil rights throughout the land". "[W]e demand", concurred Senator Wilson, "that by irreversible guarantees no portion of the population of the country shall be degraded" – that all shall receive "protection by equal laws". *Id.*, 39th Cong., 1st Sess. 474, 322, 1760, 599, 322, 340, 343 (1866).

Similarly in the House debates, the congressional majority referred repeatedly to the broad equal-protection basis of the Thirteenth Amendment in support of civil-rights legislation. Representative Cook stated the basic proposition: "when [fundamental civil] rights * * * are denied to any class of men * * *, when they are subject to a system * * * which operates upon them as upon no other part of the community, they are not secured in the rights of freedom". In agreement, Representative Thomas D. Eliot argued that "the citizen must be endowed with all the rights which other men possess". And Representative Donnelly urged Congress to "make all the citizens of the country equal before the law", "to break down all walls of caste", and to "offer equal opportunities to all men". *Id.* at 1124, 513, 589.

In one of the most important arguments presented in the legislative debates, Representative William Lawrence made explicit the views of the congressional majority that the freedom secured by the Thirteenth Amendment is not merely the absence of chattel slavery. Rather, it is, on the one hand, a promise to each individual of equality with all other individuals as to those legal relations which government is competent to create, alter, or destroy; and, on the other, a guarantee

of certain immutable civil rights and immunities defining the personal liberty which government is charged to recognize and protect. As Lawrence said, the Thirteenth Amendment imposes upon the legislative authority of every government

> the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.
>
> * * * * *
>
> There is in this country no such thing as "legislative omnipotence." [State constitutions do not confer authority] to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men. * * * This has been the common understanding in our whole history, and upon which governments have been created.
>
> * * * * *
>
> It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.
>
> * * * [T]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.
>
> * * * * *
>
> Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.



> If the people of a State should become hostile to a large class of * * * citizens and should enact laws to prohibit them and no other citizens from making contracts, from * * * holding * * * property, * * * that would be prohibitory legislation. If the State should * * * enact laws for [one class of citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, * * * that would be a denial of justice.

Lawrence recognized that, "so far as there is any power in the states to limit, enlarge, or declare civil rights", the Thirteenth Amendment does not interfere with its exercise, provided that government affords all citizens an equal opportunity to enjoy such rights as it chooses to declare. But, if not, its action (as Senator Trumbull had earlier observed), constitutes "an unjust encroachment upon [individual] liberty" and "a badge of servitude which, by the Constitution, is prohibited". *Id.* at 1832-33, 474.

The dissenting opinion of Justice Field in the *Slaughter-House Cases* early reflected this understanding of the Thirteenth Amendment. Recognizing (as did the majority) that the Amendment "is general and universal in its application", Field construed the broad proscription as intended not only to abolish "slavery in the strict sense of the term", but also "to make every one born in this country a freeman", and to invalidate any law which "makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others". 83 U.S. (16 Wall.) 36, 90-91 (1873) (approving argument of counsel). Almost a century later, this Court adopted identical reasoning to hold in

*Griffin v. Breckenridge* that the Thirteenth Amendment can serve as a source of constitutional power for Congress to reach a conspiracy based on an invidiously discriminatory animus to deprive individuals of equal protection of the laws. 403 U.S. 88, 102-05 (1971).[2]

In sum, the legislative history proves that equal protection in the exercise and enjoyment of the freedom to contract for employment is one of the fundamental guarantees of the Thirteenth Amendment.

## II.

**Article IV, §2 denies a state any power to discriminate in favor of its own citizens with respect to the freedom to contract for employment in the common callings of interstate commerce.**

That the Thirteenth Amendment establishes the freedom to contract for employment on the basis of legal equality with all other individuals as a fundamental personal liberty does not end our inquiry, however. For the Appellants did not raise that Amendment in the courts below. Nevertheless, their reliance instead upon Article IV, §2 does not foreclose application of Thirteenth-Amendment principles – since that Article includes freedom of contract in employ-

[2] *Griffin* involved racial discrimination; but the Court left open the possibility that other forms of invidious, class-based discrimination were actionable. 403 U.S. at 102 & n.9. At least one such invidious discrimination is recognized in Article IV, §2 – namely, that against citizens of other states.



ment among the "privileges" it secures; and absolutely guarantees that freedom where the "common callings" of interstate commerce are concerned.

### A. Freedom of contract in employment is among the privileges which Article IV, §2 secures against state discrimination.

Article IV, §2 does not enumerate the "privileges and immunities" it guarantees. But both constitutional history and judicial precedent teach that freedom of contract in employment is among them.

*First*, Article IV, §2 derives in both purpose and phraseology from Article IV of the Articles of Confederation. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873). And the latter article specifically provided that "the people of each state * * * shall enjoy [in any other state] all the privileges of trade and commerce" which "the inhabitants" of the other state enjoyed. Now, necessary to the very existence of trade and commerce in a market system is the legal privilege to offer and accept contracts of employment. Commerce, after all, is primarily a matter of common-law contract; and employment is central to the processes of production and distribution which constitute commerce. Therefore, Article IV, §2 logically denies each state any power to discriminate against citizens of any other state with respect to those citizens' freedom to contract for employment in trade and commerce – "[t]he better", the Articles of Confederation explained, "to secure and perpetuate * * * intercourse among the people of the different states". *Cf. Gibbons v. Ogden*, 22 U.S. (9

Wheat.) 1, 189-92 (1824) ("commerce" means "intercourse" among the peoples of the several states).

*Second*, the framers of the Fourteenth Amendment designed its Privileges and Immunities Clause precisely to guarantee to all citizens the fundamental liberties which the southern states had claimed a sovereign power to withhold from negroes and other "inferior" classes prior to the Civil War. W.W. Crosskey, *Politics and the Constitution in the History of the United States*, 1083-97, 1119-34 (1953). And recurrently in the debates on the Thirteenth and Fourteenth Amendments, congressional spokesmen identified Article IV, §2 as a repository of the same basic freedoms which they intended the new Amendments and their statutory progeny to embody and enforce. *E.g., Cong. Globe*, 38th Cong., 2d Sess. 193 (1865) (Representative Kasson); *id.*, 39th Cong., 1st Sess. 319, 474-75, 600 (Senator Trumbull), 704 (Senator Howard), 1034 (Representative Bingham), 2765 (Senator Howard), 3035 (Senator Henderson), 3035 (Senator McDougall). The Privileges and Immunities Clause of the Fourteenth Amendment embraces *inter alia* all those individual freedoms which owe their existence, in the sense of legal recognition, to the Constitution – not the least of which are the liberties the Thirteenth Amendment protects. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873). Therefore, Article IV, §2 logically embraces the same privileges and immunities, or, in this case, the freedom to contract for employment on the basis of legal equality with all other citizens.

*Third*, this Court has repeatedly held, at least implicitly, that Article IV, §2 guarantees an equal freedom of contract in employment. Immediately after



the Civil War, the Court ruled on two occasions that that Article protects citizens engaging "in lawful commerce, trade, or business" and "in the acquisition and enjoyment of property" from invidious discrimination. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). More recently, the Court again held that "doing business" and the "common callings" are within the purview of the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385, 396, 403 (1948). As far as wage-earners are concerned, though, commerce, trade, business, the common callings, and even the acquisition of property are peculiarly the subject-matter of employment contracts. Therefore, if Article IV, §2 guarantees employees substantial equality in the practice of the common callings and in the acquisition of property derived from that practice, it logically must also protect the primary means by which employees and their employers order their mutual relationships – namely, freedom of contract in employment.

### B. A state may not grant a monopoly of employment to its own citizens where that employment involves interstate commerce.

Its source in the Thirteenth Amendment implies that the freedom to contract for employment on the basis of legal equality with all other individuals, rightly understood, is not subject to any exceptions or conditions, even if its mechanism of enforcement involves Article IV, §2. The Supreme Court of Alaska, however, purported to find just such an "exception" in

the notion that, under Article IV, §2, "a state may prefer its own residents in dealing with natural resources it owns". Jurisdictional Statement at 19a. Under the circumstances of this case, no such "exception" is applicable, for two reasons.

*First*, Article IV, §2 grants no general permission for the states to establish commercial monopolies on behalf of their citizens. *Toomer v. Witsell*, 334 U.S. 385, 395-99 (1948). And that is true even if the subject of the monopoly is resources or employment opportunities adventitiously found within the state. *Id.* at 402-03; *see also Truax v. Raich*, 239 U.S. 33, 41-42 (1915).

*Second*, the so-called "natural-resources exception" to Article IV, §2 is not an exception to that provision at all, but instead refers to a situation not within the ken of the Article in any event. The Constitution imposes no duty on a state to allow *its* resources – that is, resources the legal title to which resides in the citizens of the state as a sovereign body – to move in interstate commerce. There is no constitutional duty to sell what one owns, whether the owner be a private citizen or a sovereign state. But if a state may constitutionally eschew commerce in the resources it owns between itself and citizens of other states, then only citizens of the owner-state can ever participate in ownership of those resources; and citizens of other states can never acquire any proprietary interest in the resources, by contract or otherwise. In this situation, there is and can be no discrimination constitutionally cognizable under Article IV, §2 where the state outlaws contracts for interstate transfer of such resources, because citizens of one state have no general "privilege" to share or participate in the ownership of property



belonging exclusively to citizens of another state, if the latter citizens decide as a sovereign body to reserve for themselves the use and benefit of their common property. The Constitution does not require any state to make a contract with the citizens of any other state for the sale or transfer of resources it owns and which it desires to retain within its borders. Neither does it disable any state from denying its citizens a privilege themselves to alienate to noncitizens any portion of those resources. *Geer v. Connecticut*, 161 U.S. 519, 529-32 (1896); *McCready v. Virginia*, 94 U.S. 391, 395-96 (1877).

Similarly, a state may refuse to hire citizens of another state as public employees, without offending Article IV, §2. Public employees, after all, themselves exercise or serve as the vehicle through which the people exercise some portion of the sovereign authority of a state. And the privilege to participate directly or indirectly in the exercise of a state's sovereignty is not one which the Constitution grants to noncitizens. The situation might be different if the operations of a state's government were an aspect of interstate commerce. But nothing is more obvious than that "government" is not "commerce" in the constitutional sense of those terms. *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

In short, the "natural-resources", "ownership", or "sovereignty" theories permit a state to discriminate between its citizens and citizens of other states precisely because the latter citizens have no rationally defensible constitutional privilege to acquire a proprietary interest in the state's resources or to participate directly or indirectly in the exercise of its sovereignty.

Therefore, in such situations, Article IV, §2 is inapplicable by hypothesis. However, where (as here) a state specifically exploits its resources for and directs them into the stream of interstate commerce, and creates employment opportunities inextricably connected with the preparation of those resources for and their delivery to or transportation in interstate commerce, the "ownership" theory is no longer relevant. All citizens, of every state, have an equal constitutional privilege to participate in interstate commerce. And once a state's resources or jobs related thereto become a part of interstate commerce, the state must eschew any discrimination between its citizens and those of other states which lacks a real and substantial basis in some *bona fide* occupational qualification. Article IV, §2 applies in such a case because the state, by permitting the resources it owns to flow into interstate commerce, has itself recognized the claim of citizens of all other states, under the Commerce Clause, to participate in a national market for those resources and the employment opportunities their exploitation creates. *See Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11-13 (1928). In such a case, the state has no more power to discriminate against citizens of other states than it would if it attempted to stifle interstate commerce in property it does not own. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 595-600 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 250-60 (1911).



## III.

**A state which discriminates in favor of its own citizens with respect to freedom of contract in employment frustrates operation of the national labor market which the Commerce Clause established and protects.**

The Supreme Court of Alaska opined that the Appellants did not properly raise issues arising under the Commerce Clause in the courts below. Jurisdictional Statement at 18a. We have seen, however, that there is an inextricable connexion in this case among Article IV, §2, the Thirteenth Amendment, and the Commerce Clause. Article IV, §2 prohibits a state from discriminating against citizens of other states with regard to certain privileges and immunities. The Thirteenth Amendment is the source of one of these privileges: namely, the freedom to contract for employment on the basis of legal equality with all other individuals. And the Commerce Clause defines another closely related liberty: namely, the privilege of each person to participate in a national labor market unhampered by local restrictionism or protectionism.

### A. A state may not impede the free flow of labor in interstate commerce in order to benefit its own economy.

The grant of power to Congress in the Commerce Clause is unaccompanied by any explicit limitation on the powers of the states over commercial matters. This Court early held, however, that the Clause impliedly

denies the states any authority to impose burdens on interstate commerce where the subject-matter on which they intend their laws to operate is national in character and requires uniformity of regulation. *E.g., Leisy v. Hardin*, 135 U.S. 100, 119-20 (1890). The major principles of this judicial doctrine are so well known as to render their restatement here supererogatory. *See, e.g., Southern Pacific Co. v. Arizona* ex rel. *Sullivan*, 325 U.S. 761, 766-70 (1945). But three points deserve special emphasis.

*First*, interstate commerce is not merely transportation. Rather, it includes all the "components parts" and "essential elements" of commercial intercourse among the states. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

*Second*, one of these "essential elements" is a national labor market which presupposes competition among the citizens of different states for employment in those trades and industries that serve the needs of interstate commerce. *E.g., H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 531-39 (1949).

*Third*, a state may not justify its interference with the free functioning of the national labor market by simplistic appeals to "conservation", to the "economic welfare" of its citizens, or even to the real social and economic burdens of unemployment. *Id.* at 538; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *Edwards v. California*, 314 U.S. 160, 173-76 (1941). That a particular state's economy may benefit peculiarly from a restriction on interstate commerce, at the expense of the nation as a whole, is a compelling reason for disallowing, not for approbating, the state's action.



**B. A violation of Article IV, §2 with respect to freedom of contract in employment constitutes a burden on commerce.**

Where freedom of contract in employment is concerned, Article IV, §2 supports the same conclusion. On the one hand, the Thirteenth Amendment guarantees all individuals legal equality to contract for employment; and that liberty is one of the privileges of national citizenship which every state must respect. *Supra* pp. 9-27. On the other hand, the essence of commerce is the formation of market prices which permit rational economic calculation to direct economic activity; for, without prices established through the market mechanism of entrepreneurial buying and selling, commerce ceases, and the production of goods and services become governmental and bureaucratic in character. L. von Mises, *Bureaucracy* (1944); T. Hoff, *Economic Calculation in the Socialist Society* (1949). Therefore, commerce, in so far as it involves labor, is identical with freedom of contract in employment. And discrimination by a state against citizens of other states with respect to that freedom is simultaneously a violation of Article IV, §2 and of the Commerce Clause.

That commerce and freedom of contract in employment are two manifestations of the same process, this Court has long recognized. Production for commerce is a part of commerce. *E.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-41 (1937). And buying and selling for the purpose of commerce is no less a part of commerce. *E.g., Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 & n.2 (1925). Therefore, buying and

selling labor services through the exercise of contractual freedom, an essential element of production for commerce, is itself commerce. This Court has held in numerous preëmption cases that the states have no power to control the content of labor contracts in the face of a contrary command from Congress under the Commerce Clause. *E.g., Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956). The same principle teaches that the states have no power to discriminate against each others' citizens in terms of contractual freedom where the Thirteenth Amendment and Article IV, §2 together mandate a contrary policy.

The mutually reinforcing relationship between Article IV, §2 and the Commerce Clause has been the subject of this Court's decisions in the past. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430-31 (1871). And, at times, it has led to spirited debates among the Court's members over which provision should control a particular case. *E.g., compare Edwards v. California*, 314 U.S. 160, 177 (1941), *with id.* at 177-81 (Douglas, J., concurring), *and id.* at 181-84 (Jackson, J., concurring). Where freedom of contract in employment is concerned, however, no extended discussion or debate is necessary. Freedom of contract in employment is both a privilege within the ken of Article IV, §2 and the essential element of commerce in human labor among the states. To abridge that freedom in violation of Article IV, §2 is and must be to burden commerce in violation of Article I, §8.

Here, then, is a striking example of the symmetry and coherence of the Constitution – which, in the Thirteenth Amendment, guarantees the "right to work" to all persons within the United States; which, in the



Commerce Clause, establishes a nationwide market free from the parochial protectionism of the states; and which, in Article IV, §2 denies the states any power to frustrate the primary means by which individuals participate as free men and women in the national labor market.

## IV.

**Because it denies freedom of contract in employment and frustrates operation of the national labor market, Alaska Hire is repugnant *per se* to the Equal Protection Clause of the Fourteenth Amendment and to Article IV, §2.**

We have demonstrated that Alaska Hire deprives citizens of states other than Alaska who desire to seek employment in that state's oil industry of both (i) their freedom to contract for employment on an equal legal basis with Alaska citizens, in violation of the Thirteenth Amendment; and (ii) their privilege to compete in a free and open national labor market, in violation of the Commerce Clause. These deprivations of basic individual liberties come within the ambit of the two constitutional provisions which the Appellants raised in the courts below.

**A. Alaska Hire discriminatorily limits freedom of contract in employment on a basis not rationally related to *bona fide* work qualifications, contrary to the Equal Protection Clause of the Fourteenth Amendment.**

No one denies that Alaska Hire discriminates, and is meant to discriminate, between Alaska citizens and citizens of other states with respect to freedom of contract in employment.[3] The Supreme Court of Alaska merely held that this discrimination is constitutional, because the freedom to contract for employment (the "right to work") is not, in its view, a "fundamental" right. We have already proven that that view is in error. Study of the legislative history of the Thirteenth Amendment and civil-rights legislation enacted pursuant to it establishes that that Amendment guarantees all individuals an absolute equality of legal privilege to offer and accept contracts for employment in whatever trade or profession they are qualified to follow or practice. The Equal Protection Clause of the Fourteenth Amendment can do no less.

To be sure, if Alaska Hire discriminated only on the basis of *bona fide* work qualifications, it would not

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[3] Alaska Hire discriminates in favor of Alaska "residents", not "citizens". But the term "resident", as defined, imports citizenship, not merely place of abode. *See* Alas. Stat. §§38.40.090(3) ("resident" means a person who "has established a residency for voting purposes within the state"), 38.40.090(5) ("resident" means a person who "shows by all attending circumstances that his intent is to make Alaska his permanent residence"). In the absence of disagreement by the Alaska courts, this is enough to bring Article IV, §2 into play. *Contrast* La Tourette v. McMaster, 248 U.S. 465, 469-70 (1919).



offend the Thirteenth or Fourteenth Amendments. But the law has nothing to do with such qualifications. Neither the statute itself nor the opinion of the Alaska Court advances the incredible proposition that all Alaska citizens are more qualified to work in that state's oil industry than are citizens of other states. Indeed, the law itself refutes any such presumption, since it expressly permits "casual or intermittent", and even "emergency", employment of citizens from other states. Alas. Stat. §35.020(b, c). Moreover, neither the statute itself nor the opinion of the Alaska Court suggests that the goal or result of Alaska Hire is or will be to establish or enforce special state-mandated work qualifications. Rather, the law expressly leaves the question of a prospective employee's qualification for employment to the employer, according to "the reasonable standards of the industry". Alas. Stat. §§35.090(12), 38.40.060(b).

In sum, the true purpose and effect of Alaska Hire is to monopolize certain employment opportunities in interstate commerce for Alaska citizens. And so the Alaska Legislature candidly admits. Alas. Stat. §§38.40.010, 38.40.020, 38.40.030. This purpose, however, is not consistent with the concept of equal protection in the exercise and enjoyment of freedom of contract in employment which the Thirteenth and Fourteenth Amendments embody. Its inconsistency with those Amendments, furthermore, is absolute. There is no conceivable "compelling state interest" which can override legal equality in the freedom to contract for employment. For denial of legal equality in the exercise and enjoyment of that freedom is the preëminent badge and incident of slavery; and, as the

Thirteenth Amendment unequivocally commands, slavery, in any of its manifestations, shall not exist within the United States. The enforcement of that command, and that command only, can provide equal protection of the law in this case.

### B. Alaska Hire impedes interstate commerce in labor services, contrary to Article IV, §2.

The Supreme Court of Alaska did not deny that Alaska Hire burdens interstate commerce in labor services. It avoided the issue that burden raises, by ruling that "no commerce clause claim is advanced" against the statute. Jurisdictional Statement at 17a-18a. As we have shown, however, the principle of a national labor market untrammelled by state protectionism and restrictionism is inherent and unavoidable in this case, even though it arises only indirectly under Article IV, §2. And it is the interstate-commerce aspect of the case which vitiates the Alaska Court's sole rationale for Alaska Hire.

The Alaska Court sought "to consider Alaska Hire an economic measure justified by * * * the principle that a state may prefer its residents in dealing with natural resources it owns". Jurisdictional Statement at 19a. That the latter principle may apply to resources the legal title to which is in a state, and which the state intends to withhold completely from interstate commerce, is true; but that it does not apply to resources which a state intends to send or permits to flow into the channels of interstate commerce is equally true, and controlling here. *Supra* pp. 28-30. Alaska Hire is



unconstitutional under Article IV, §2 not, as the Alaska Court suggested, simply because it "make[s] benefits available to citizens of Alaska in preference to citizens of other states", but rather specifically because it denies citizens of other states an equal opportunity to seek employment in Alaska in an industry involved in interstate commerce.

For a discriminatory statute with this effect, there is no "natural-resources exception" to Article IV, §2. Indeed, the very existence of the Commerce Clause and the burden-on-commerce doctrine which this Court has elaborated over the years teaches exactly the opposite. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 595-600 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 250-60 (1911).

## CONCLUSION

This Court should reverse the decision of the Supreme Court of Alaska, and declare Alaska Hire repugnant to the Equal Protection Clause of the Fourteenth Amendment and to Article IV, §2.

Respectfully submitted,

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